Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007-2014 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011.

He is a member of the Society of American Baseball Research (SABR).

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DT: January 8, 2015

RE: In Re Bisbikis Trust
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

MIDGET ALL-STAR TEAM

Baseball players are traditionally a tall lot, perhaps not like basketball players but they do enjoy a large physical stature.

There have been a good number of short baseball players, but I tried to select a team of players that had some prominence.

My criteria was simple, you had to be five foot six or under.

At second base I chose Jose Altuve. He was five foot six and was voted the MVP in 2014. He had 225 hits, 56 stolen bases, and a batting average of .3401 leading the league in all three categories.

First base. This was somewhat harder because first basemen, presumably because of their reach, are a taller group. Fred Haney was a Tiger who played in the teams and had played 11 games at first base. He was five foot six inches tall.

At third base I chose Joe Sewell, a member of the Hall of Fame. He had a lifetime average of .312. His records show that he played at five foot six and a half inches, but I think that can be contested. Although primarily a shortstop he played 642 games at third base.

As catcher I chose Tony Rego. He had a lifetime average of .287 and was five foot four inches tall and weighed 140 pounds. He was known as the Mighty Midget and he played for two years in the 20's with the St. Louis Browns.

At shortstop I chose another Hall-of-Famer, Phil Rizzuto. He was five foot six and played 13 years despite being in the armed forces for three years. He had a .273 lifetime batting average and a .355 slugging average. He had a .968 fielding average and he went to the World Series with the Yankees ten times.

In the outfield I chose another Hall-of-Famer, Hack Wilson. Hack was five foot six and lead the league three times in home runs, once with 56 dingers. The same year he led the league and set a league record at 109 RBI. He had a .965 fielding average and .307 batting average and a .545 slugging average.

Hack is joined in the outfield with Albie Pearson. Albie was five foot five and weighed 140 pounds and lead the league once in runs with 115. He had a lifetime batting average of .270.

Albie is sandwiched by Hack Wilson and Wee Willie Keeler. Keeler was five foot four inches tall, weighed 140 pounds and had a lifetime average of .343 and a slugging average of .418. He led the league twice with hits, including one year at 239 hits and twice in batting average and once in runs scored. He is also a hall of famer.

For a left handed pitcher I chose Bobby Shantz. Bobby was five six and weighed 139 pounds. He had 119 wins and 99 losses. A lifetime ERA of 3.38.

Finding a right-handed pitcher was not easy, but I found one in Jimmy Bannon who was five foot five and played three games in the National League in 1893 and 1894 for the St. Louis Cardinals and the Boston Braves.

Do you have any favorites?

REVIEW OF CASE:

Reference Files: Time of Appeal
Documents as Amendments to Trust

Decedent left handwritten notes long after the execution of a written Trust. Appellate sought to have them judicially deemed an Amended to the Trust pursuant to MCL 700.7602(3)(a) allowing for same.

Appellee moved for Summary Disposition claiming that the notes were beyond the allowable types of documents to fall within the Trust Code provisions. Appellant prevailed on Summary Disposition.

The Court of Appeals first considered the timeliness of the service of the Order of Dismissal.

Appellee claimed there was a violation of 2.602 requiring service within seven (7) days.

The Court of Appeals properly pointed out that when there was a violation that an Appellant could follow MCR 7.204(a)(3) by filing an Affidavit stating that they were served beyond the time limit and that the Appellant would have a valid appeal unless the Appellee filed an opposing Affidavit thus, the timeliness of the appeal was valid.

Next the Court of Appeals ruled that they analyzed this case de novo not because it was a Summary Disposition but because it was the construction of a Trust or Will.

This is not technically correct. I would have preferred that they analyzed the de novo as the granting of Summary Disposition simply because neither the lower Court nor the Court of Appeals was not construing a Trust, but documents it found **not** to be a Trust.

To avoid circularity, I would have suggested law regarding the interpretation of written instruments. Since the position of Appellant was in the nature of rescission or reformation perhaps the case of Kobylinski vs. Szeliga, 307 Mich, 306 would have been more appropriate. However, the Bisbikis case can be taken as law that when construing documents allegedly testamentary in nature you use the same law for construction as you use for interpreting documents that are testamentary in nature.

The Court of Appeals could have merely found that there was no mention of the Trust in the letters nor was there the use of the word “amendment” and found de novo that the documents in question would be beyond the scope of MCL 700.7602(3)(a). The Court however, probably because the word “Trust” was mentioned as “part of the history” in the documents, and because there was a case, *In Re Stillwell*, 299 Mich App 294, which allowed notes to be considered an amendment, the Court did its job and did construe the notes de novo by distinguishing *Stillwell* and thereby laying down a pretty good road map as to when you do and when you don’t comply with *Stillwell* and thus MCL 700.7602(3)(a).

Stillwell	Chase
1. Delivery of notes to Trustee	1. None, the Court of Appeals found that delivery created an inference of intent to amend.
2. Notes on envelope that these were final directives.	2. None and the word "directive" was not used.
3. There was a summary of assets.	3. None.
4. Used the word "directives".	4. None.
5. There were inconsistencies.	5. Only one inconsistency in language.

The Probate Bar is urged to take a look at pages 70 through 73 of the Michigan Bar Journal for December 2014. The jury instructions regarding burden of proof for Will contests for presumption of undue influence have been deleted and are continuing to be reviewed.

AAM:kjd
Attachment
787926

STATE OF MICHIGAN

COURT OF APPEALS

In re BISBIKIS TRUST.

CLARISSA BISBIKIS,

Petitioner-Appellant,

v

JOHN CHASE III, Trustee of the PETER GEORGE BISBIKIS REVOCABLE TRUST, and MICHAEL PETER BISBIKIS,

Respondents-Appellees.

UNPUBLISHED
November 20, 2014

No. 317588
Wayne Probate Court
LC No. 12-775044-TT

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Petitioner appeals as of right the trial court's order granting respondent trustee's motion to dismiss her request to construe a letter as an amendment to the Trust.[1] We affirm.

As an initial matter, we find meritless respondent's claim that petitioner's appeal is untimely because she had actual notice of the October 11, 2012, order when it was first issued. Pursuant to MCR 7.204(A)(3):

> Where service of the judgment or order on appellant was delayed beyond the time stated in MCR 2.602, the claim of appeal must be accompanied by an affidavit setting forth facts showing that the service was beyond the time stated in MCR 2.602. Appellee may file an opposing affidavit within 14 days after being served with the claim of appeal and affidavit. If the Court of Appeals finds that service of the judgment or order was delayed beyond the time stated in MCR

[1] Michael Peter Bisbikis and John Chase III, Trustee of the Peter George Bisbikis Revocable Trust, are the respondents in this case. However, although Michael Bisbikis is listed as a respondent in the trial court, he is not a party to this appeal. For ease of discussion, we refer to the trustee as "respondent."

2.602 and the claim of appeal was filed within 14 days after service of the judgment or order, the claim of appeal will be deemed timely.

Here, service of the order dismissing petitioner's petition was delayed beyond the time stated in MCR 2.602. The claim of appeal was accompanied by an affidavit setting forth facts to show that. Further, the claim of appeal was filed within 14 days after petitioner was actually served with the order. However, respondent did not file an opposing affidavit within 14 days after being served with the claim of appeal and affidavit. Accordingly, petitioner's claim was timely under MCR 7.204(A)(3).

The basic facts are undisputed. In June of 1994, the Peter George Bisbikis Revocable Living Trust was established. The trust was amended in 1998 to provide that, upon the settlor's death, 4/5ths of the trust assets would be held in "the Children's Trust" for the benefit of the settlor's four children, and 1/5th of the trust assets would be held in the "Marital Portion" for the benefit of the petitioner, the settlor's wife. Peter Bisbikis, the settlor, passed away in May of 2011. Before his death, petitioner was his wife and the mother of his two younger children.

On April 1, 2012, petitioner filed a request to construe an undated, handwritten letter as an amendment to the trust. In response, respondent trustee filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the letter was actually a series of letters that appeared to be written at different times. Respondent asserted that the "letter" or "letters" did not refer to the 1998 trust and did not indicate Bisbikis's intent to amend the trust agreement. On October 11, 2012, the trial court heard oral argument on respondent's motion to dismiss. The court held that the letter did not amend the trust agreement because it was undated, did not reference to the trust agreement, and did not indicate Bisbikis's intent to alter or amend the trust agreement. Accordingly, the trial court granted the motion to dismiss petitioner's request to construe the letter as an amendment to the trust provision.

On appeal, petitioner argues that the letter altered the terms of the trust agreement because it substantially complied with MCL 700.7602(3)(a). We disagree.

A probate court's construction and interpretation of the language used in a will or a trust is reviewed de novo. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). A probate court's factual findings are reviewed for clear error. *In re Raymond Estate*, 483 Mich 48, 53; 764 NW2d 1 (2009). "[A] court's sole objective [in construing a trust] is to ascertain and give effect to the intent of the settlor." *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). "Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust." *In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353 (2012).

"With respect to the amendment of a trust, the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, governs the application of a trust in Michigan." *Id.* Pursuant to MCL 700.7602(3)(a), a settlor may amend a revocable trust in Michigan by "substantially complying with a method provided in the terms of the Trust." In this case, amendment of the trust was governed by Article II, paragraph (a), which provided that the settlor reserved:

> (a) the right and power to change, amend, or alter any of the terms and provisions of this Trust Agreement as the Settlor may at any time so elect, such alteration or amendment to become effective immediately upon the execution by the Settlor of a writing specifically referring to this Trust Agreement and indicating the intent to so alter or amend, whether or not such writing be witnessed or notarized.

This Court recently addressed a fact situation similar to this case in *In re Stillwell Trust*, 299 Mich App at 294-297. In *Stillwell*, the trust agreement provided that the settlor could "by instrument in writing delivered to the Trustee . . . modify or alter this Agreement in any manner . . . ." *Id.* at 292. Sometime before her death, the settlor instructed an adult grandson to deliver an envelope to the successor trustee in the event that something happened to her. *Id.* The envelope, which was addressed to the successor trustee, contained several pages of handwritten, dated notes in sequential order. *Id.* Based on the notes, the successor trustee petitioned the trial court to construe the notes as an amendment to the trust; however, the respondent argued that the notes had no lawful affect because they were unsigned and did not include the word "amendment." *Id.* at 294. This Court held that a review of the notes showed that the settlor clearly intended to amend the trust. *Id.* at 295. However, unlike the notes in *Stillwell*, the handwritten letter in this case does not clearly indicate Bisbikis's intent to amend the trust. A side-by-side comparison reveals the deficiencies in petitioner's case.

First, in *Stillwell* there were significant indicia on the envelope of the settlor's intent that the notes would constitute her final directive on the distribution of her estate. *Id.* Specifically, the envelope was addressed to and delivered to the successor trustee. *Id.* Moreover, on the outside of the envelope, the settlor referred to the notes as "a summary of my estate and instructions," and she expressly summarized her entire estate, including her real property, gold, bank account, and stocks. *Id.* Thus, the delivery to the trustee in *Stillwell* permitted an inference that the notes inside the envelope were intended to affect the settlor's estate. In contrast, the letter in this case was undelivered and was addressed to petitioner, the settlor's wife, using the personal salutation "My dearest Clarissa" and ended with the closing "Love, Pete." The language used does not suggest that it was intended to alter the distribution of the trust assets. Further, there was no envelope indicating that the letter pertained to the distribution of the estate in any way.

More importantly, in *Stillwell* we held that the contents of the notes contained plain directives regarding the settlor's assets. *Id.* at 295. Specifically, the notes contained directives on how the real property was to be distributed in the event that the settlor's heirs lived with and cared for her. *Id.* It also contained directives to the successor trustee to divide all of her assets. *Id.* The settlor in *Stillwell* used language like "My latest directives are as follows," and "This is my latest directive to the family." *Id.* Further, the notes contained clear inconsistencies between terms of the trust agreement—which provided, for the most part, that all assets were to be divided equally among the beneficiaries—and the notes, which expressly provided that certain beneficiaries' college debt was to be paid before the assets were divided. *Id.* at 296. Here, in contrast, the closest the letter comes to giving a directive is the passage: "In the event of [a]n untimely death it goes as follows—I have explained to you in the past and it wasn't bullshit. So I will outline it so maybe you'll get the full picture and start trusting my judgment as I trust yours." Bisbikis then proceeded to make a two-columned list outlining the distribution of some

assets. The list does not specify whether the assets were held in the trust or outside of the trust. Further, it did not even refer to the trust agreement in conjunction with the list. Thus, unlike the directive in *Stillwell*, there is nothing in this case referring to the terms of the trust in conjunction with the inconsistent language. Instead, the sole reference to the trust agreement occurred two pages earlier in the letter when Bisbikis was merely relating his history to petitioner. In addition, instead of the strong language directing the distribution of assets in the notes in *Stillwell*, the letter in this case contains language that strongly suggests that Bisbikis did not intend to alter his trust. Specifically, Bisbikis stated that he was "slightly disturbed" by petitioner's questions about finances and that he was "under the impression that [petitioner] felt everything" would belong to petitioner in the event of Bisbikis's untimely death. Bisbikis then clearly stated that petitioner was only correct to a certain degree. He noted that he had to protect petitioner and all of his children. He also stated that if he "died tomorrow" he wanted everyone to be O.K." (emphasis in original). He also stated that he wanted to help all of his children and even his grandchildren. Based on the foregoing, we conclude that the single inconsistency between the list in the letter and the distribution of assets mandated by the amended trust agreement does not amount to substantial compliance with the trust provision allowing amendment of the trust agreement.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood